

**ARBITRATION AND ABUSE OF PROCESS: MICHAEL WILSON & PARTNERS LTD v
SINCLAIR [2017] EWCA Civ 3**

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If party A claims in legal proceedings against C, on a basis which has been decided against A in arbitration proceedings between A and B, does this amount to an abuse of process? In *Michael Wilson & Partners Ltd v Sinclair & Anor*,¹ the English Court of Appeal considered this issue and found that while a prior arbitral award could form the basis of an abuse of process (even where the parties were not identical), the exacting test which had to be satisfied had not been met on the facts.

FACTS

In 2006 the claimant, Michael Wilson & Partners Ltd (“MWP”), commenced arbitration proceedings against Mr John Emmott, a former director and employee of MWP. It alleged that Mr Emmott had received shares and funds as a bribe or secret commission from Thomas Sinclair and Sokol Holdings Incorporated (the “Sinclair Defendants”). In 2010, the arbitral tribunal (Lord Millet, Christopher Berry and Valerie Davies) issued an award rejecting the claim. It found that Mr Emmott had received the shares on behalf of Mr Sinclair and had neither control over nor a beneficial interest in them. The Sinclair Defendants were not parties to the arbitration, although Mr Sinclair was ‘involved’ and did give evidence to the arbitral tribunal (at [9]).

MWP subsequently commenced proceedings in the Commercial Court in London against the Sinclair Defendants.² It alleged that Mr Emmott had acquired the shares in breach of his fiduciary duties and that the Sinclair Defendants had knowingly assisted him or, in the alternative, that the transfer of the shares from the Sinclair defendants to Mr Emmott constituted the payment of a bribe or secret commission. The claim in the Commercial Court was ‘entirely inconsistent with, and contrary to the findings made in, the award to which MWP had been a party’ (at [10]).

The Sinclair Defendants applied to have the claim struck out or summarily dismissed on the ground that it was an abuse of process. At first instance, Teare J struck out the proceedings,³ concluding that it would be an abuse of the court’s processes to allow MWP to make factual allegations that had been made (and rejected) in the earlier arbitration. MWP appealed against this decision.

DECISION

Abuse of process

The Court began by discussing the law relating to abuse of process generally (at [39]-[49]). It referred to the seminal description of the doctrine given by Lord Diplock in *Hunter v Chief Constable of the West Midlands*:

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¹ [2017] EWCA Civ 3 (13 January 2017). We gratefully adopt the Court’s framing of the issue at [13].

² MWP also commenced proceedings against two other defendants, however, they were not respondents to the appeal.

³ [2012] EWHC 2560 (Comm), save for one claim in debt.

[T]he inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.⁴

One particular application of the doctrine is in the power of a court to strike out a claim for abuse of process. That power was said to be founded on two interests: ‘the *private* interest of a party not to be vexed twice for the same reason and the *public* interest of the state in not having issues repeatedly litigated’ (at [48], emphasis added). While the Court conceded that ‘an attempt to relitigate in another action issues which have been fully investigated and decided in a former action’⁵ may constitute an abuse of process, it was unwilling to lay down a general rule to that effect. The power to strike out would only be exercised where ‘justice and public policy demand it’.⁶

To determine whether the proceedings constituted an abuse of process the Court was required to engage in a ‘merits based’ analysis of the facts, with a view to answering the ‘crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court’.⁷ The Court noted that an abuse of process might be found even where the same parties have not been part of both proceedings, given that there might be circumstances sufficient to bring the case ‘within the spirit of the rules’.⁸ One example where that might occur would be where ‘it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated’.⁹ In that respect the Court noted that it would be ‘a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse’.¹⁰

Application of abuse of process to prior arbitral awards

MWP sought to argue that a prior arbitration award could not form the basis of an abuse of process. It relied on the previous decision of the Court of Appeal in *Sun Life Assurance Company of Canada v Lincoln National Life Insurance Company*,¹¹ in which the Court was concerned with the effect of an arbitral award relating to a dispute between X and Y on separate arbitration proceedings between X and Z, where the legal position between X and Y was in issue. In that case, Mance LJ highlighted the important differences between arbitration and litigation. In particular, his Lordship emphasised the public nature of litigation compared with the private nature of arbitration. As a result, ‘[d]ifferent arbitrations on closely inter-linked issues may as a result lead to different results, even where... the evidence before one tribunal is very largely the same as that before the other.’¹² The Court did not, however, consider that Mance LJ’s observations supported the proposition that an arbitral award could not form the basis of an abuse of process. In particular, it was observed that no argument had been advanced in *Sun Life* on the basis of an abuse of process.¹³ Instead, the only proposition the Court was prepared to take from *Sun Life* was that ‘there are good reasons why a court should be cautious before accepting that later court

⁴ *Hunter v Chief Constable of the West Midlands* [1982] AC 529, 536.

⁵ *Bragg v Oceanus Mutual* [1982] 2 Lloyd’s Rep 132, 137 (Kerr LJ).

⁶ *Arthur J S Hall & Co (a firm) v Simons* [2002] 1 AC 615, 702 (Lord Hoffmann).

⁷ *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31 (Lord Bingham).

⁸ *Arthur J S Hall & Co (a firm) v Simons* [2002] 1 AC 615, 701 (Lord Hoffmann).

⁹ *Secretary of State for Trade and Industry v Baird* [2004] Ch 1, [38] (Andrew Morritt V-C).

¹⁰ *In re Norris* [2001] 1 WLR 1388, [26] (Lord Hobhouse).

¹¹ [2005] 1 Lloyd’s Law Rep 606.

¹² *Sun Life Assurance Company of Canada and others v Lincoln National Life Insurance Company* [2005] 1 Lloyd’s Law Rep 606, [68] cited at [53].

¹³ [2005] 1 Lloyd’s Law Rep 606, [63].

proceedings are an abuse of its process because it involves a collateral attack on an earlier arbitration award (at [54]).

The Court also referred to the decision of the High Court of Hong Kong in *Parakou Shipping Pte Ltd v Jinhui Shipping and Transportation Ltd*.¹⁴ In that case, Reyes J (faced with analogous facts) considered that the *Sun Life* case did not prevent a claim being struck out on grounds of abuse of process where the prior proceeding was an arbitration.

Teare J, at first instance, also concluded that an arbitral award could give rise to an abuse of process claim in subsequent proceedings. His Honour stated (at [50]):

[T]here is high authority for saying that it is unwise to limit to fixed categories the circumstances in which it is the court's duty to prevent its processes from being abused... I have therefore concluded that there can be no rule that the court can have no such duty merely because the tribunal whose decision is under attack is an arbitral tribunal. However, it will probably be a rare case where an action in this court against a non-party to an arbitration can be said to be an abuse of the process of this court.¹⁵

The Court of Appeal agreed with this statement of law, warning against setting limits and fixing categories in which the court will act to prevent an abuse of process (at [67]). It noted that there is ‘no “hard edged” rule that a prior arbitration award cannot found an argument that subsequent litigation is an abuse of process’ (at [67]). The Court also agreed with the observation of Teare J that only in rare cases would court proceedings against a non-party to an arbitration amount to an abuse of process (at [69]).

Having concluded that a prior arbitral award could found an abuse of process argument, the issue was whether or not the facts of this case were sufficient to bring it within the scope of the doctrine (at [69]).¹⁶

Was the present claim an abuse of process?

The Court of Appeal was ultimately of the opinion that the threshold for abuse of process had not been met (at [87]). According to the Court, there were a number of considerations that weighed against the finding that the claim was an abuse of process.

The Court relied on the fact that the earlier arbitration proceedings were proceedings to which Mr Sinclair had not been a party. In particular, it took note of the fact that Mr Sinclair had declined to join the arbitration proceedings after being invited by MWP. The effect of this was that while an award would bind the defendants in the arbitration, it would not bind him. The Court commented that:

Despite this [Mr Sinclair] now relied on the arbitration proceedings and award to characterise MWP's claim against him as an abuse of process, seeking to take the benefit of an arbitration award by which the Sinclair [D]efendants would not have been bound had it been decided differently.¹⁷

According to the Court, this ‘lack of mutuality’¹⁸ was ‘a highly material, if not dispositive, factor’ (at [20]).

¹⁴ (2010) HCAJ 184/2009.

¹⁵ [2017] EWCA Civ 3 (13 January 2017) [50].

¹⁶ The Court also considered briefly whether the arbitral award was admissible for the purposes of the application and the appeal (at [70]-[75]). It considered it ‘plainly necessary to look at the earlier decision’ and noted that ‘the suggestion that it is inadmissible for such a purpose is wrong’ (at [73]).

¹⁷ [2017] EWCA Civ 3 (13 January 2017) [90].

In finding that the threshold had not been met, the Court also noted that Teare J had placed too much emphasis on the arbitration and the award to which the Sinclair Defendants were *not* a party (at [92]). In addition, his Honour placed too much weight on the fact that because MWP was inviting the Court to arrive at a different conclusion with respect to Mr Emmott, it was ‘mounting an illegitimate collateral attack on the award’ (at [94]). The Court cited Lord Hobhouse’s statement in *Arthur J S Hall & Co (a firm) v Simons* that ‘[t]here is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived in another case’.¹⁹

The fact that Mr Sinclair had been involved in the arbitration did not alter this conclusion. His involvement in the arbitration would not have been sufficient to bind him and, emphasising the lack of mutuality, the Court saw no reason why it should bear any material weight. Similarly, the Court dismissed concerns expressed by Teare J that it would be manifestly unfair for Mr Emmott (the defendant in the arbitration) to face MWP’s allegations for a second time. Mr Emmott was not being sued by MWP and no relief was sought against him. He was no more than a ‘potential witness’ (at [99]).

COMMENT

While the decision of the Court of Appeal may at first glance appear contrary to intuition, a close examination of the reasoning of the Court demonstrates that it is undoubtedly correct. In circumstances where Mr Sinclair had voluntarily opted not to be a part of the original arbitration, it would offend ordinary sensibilities for him to be able to rely on the arbitral award to have subsequent proceedings against him struck out. The Court’s emphasis on this lack of mutuality is reminiscent of *Sun Life*, where Mance LJ commented that ‘there is a strong element of fortuity about the one-sided benefit for which [Counsel] contends’.²⁰

That is not to suggest, however, that proceedings brought in such circumstances may never constitute an abuse of process. By way of contrast, the High Court of Hong Kong came to the opposite conclusion in *Parakou Shipping*. In that case the relevant defendants were found to be privies of the original party (at [116] of *Parakou*) and were therefore bound by the arbitral award. It might be noted that this finding arguably would also have meant the plaintiff was estopped *per rem judicatam*. Reyes J nonetheless decided the case on the grounds of abuse of process and considered the issue of mutuality, which had been discussed in *Sun Life*,²¹ but noted that the consideration was not relevant because there was privity of interest between the defendants and the original party (at [168] of *Parakou*). Here, Teare J found that the Sinclair Defendants were not Mr Emmott’s privies (at [31]-[44] of [2012] EWHC 2560), leading to a justifiably different result in the instant case.

One issue which the Court of Appeal understandably left unresolved was what facts would be sufficient to bring a case within the scope of the doctrine of abuse of process, as it applies to arbitral proceedings. The Court stated, in agreement with Teare J, that it would be ‘a rare case, and perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process’ (at [68]). Unfortunately, heeding the ‘dangers of setting limits and fixing categories of circumstances in which the

¹⁸ The lack of mutuality arose from the fact that Mr Sinclair’s participation in the arbitration would not have been sufficient to bind him in the arbitration, yet he purported to be able to rely on the findings favourable to him to found the abuse of process claim.

¹⁹ [2002] 1 AC 615, 743.

²⁰ [2005] 1 Lloyd’s Law Rep 606, [67].

²¹ [2005] 1 Lloyd’s Law Rep 606, [67].

court has a duty to act so as to prevent an abuse of process' (at [67]), the Court said no more on the matter.

The outcome in this case *might* have been different if the defendant had never been afforded the opportunity to join the proceedings by the Plaintiff and subsequently became aware of the arbitral award. In such (admittedly narrow) circumstances, whilst lack of mutuality would be a factor, the court arguably would have a stronger reason to find an abuse of process. While in the present case the defendant made the choice not to be a part of the arbitral proceedings, on these hypothetical facts the choice would be the plaintiff's. However, even this possibility appears to be beyond argument. As was observed by Teare J (at [50], expressly affirmed at [67] by the Court of Appeal):

Where a claimant has a claim against two or more persons and is obliged to bring one such claim in arbitration the defeat of that claim in arbitration will not usually prevent the claimant from pursuing his claim against the other persons in litigation. Arbitrations are private and consensual and non-parties cannot, in the absence of consent, be joined or be affected by the decisions of the arbitral tribunal.

It is difficult to envision then, *any* case in which the abuse of process doctrine could apply where the prior decision was an arbitral award.²² The situation is different in the case of ordinary judicial proceedings, where parties can be joined, non-consensually, by an order of the Court.²³ In these circumstances, there might be a stronger case for recognising our hypothetical situation as an abuse of process. This is not of itself any faulting of the Court of Appeal's decision, other than to note that the 'rare case' in which the doctrine applies to arbitral awards may in fact be non-existent. Rather, it recognises the exacting test which must be satisfied if an abuse of process claim is to succeed.

²² We put to the side cases where the defendants are privies of the original party - these cases can be dealt with by estoppel *per rem judicatam* without having to rely on the abuse of process doctrine.

²³ See, eg, *Civil Procedure Rules 1998* r 19.1.